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## 77-501 STATUTES; ADMIN. RULES AND REGULATIONS; PROCEDURES

### Attorney General's Opinions:

Parimutuel racing: refund of deposit of unsuccessful applicant for license; setoffs 88-120.

### GENERAL PROVISIONS

#### Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Act," David L. Ryan, 54 J.K.B.A. 83, 86 (1985).

**77-501.** Title. K.S.A. 1985 Supp. 77-501 through 77-541 shall be known and may be cited as the Kansas administrative procedure act.

History: L. 1984, ch. 313, § 1; July 1, 1985.

### CASE ANNOTATIONS

1. Act creates only procedural rights and imposes only procedural duties. *Expert Environmental Control, Inc. v. Walker*, 13 K.A.2d 56, 57, 761 P.2d 320 (1988).

2. Provisions of act not applicable to decisions and actions of Kansas racing commission regarding issuance of licenses (74-8801 et seq.). *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 K. 343, 364, 770 P.2d 423 (1989).

### 77-502. Definitions. As used in this act:

(a) "State agency" means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches of state government and political subdivisions of the state, which is authorized by law to administer, enforce or interpret any law of this state.

(b) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the state agency is vested by any provision of law.

(c) "License" means a franchise, permit, certification, approval, registration, charter or similar form of authorization required by law for a person to engage in a profession or occupation.

(d) "Order" means a state agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons.

(e) "Party to state agency proceedings," or "party" in context so indicating, means:

(1) A person to whom an order is specifically directed; or

(2) a person named as a party to a state agency proceeding or allowed to intervene as a party in the proceeding.

(f) "Person" means an individual, partnership, corporation, association, political subdivision or unit thereof or public or private organization or entity of any character, and includes another state agency.

(g) "Political subdivision" means political or taxing subdivisions of the state, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups or administrative units thereof, receiving or expending and supported in whole or in part by public funds.

History: L. 1984, ch. 313, § 2; L. 1988, ch. 356, § 1; July 1, 1989.

**77-503.** Application and construction. (a) This act applies only to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes.

(b) This act creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes.

History: L. 1984, ch. 313, § 3; July 1, 1985.

#### Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Act," David L. Ryan, 54 J.K.B.A. 83, 86 (1985).

### CASE ANNOTATIONS

1. Act creates only procedural rights and imposes only procedural duties. *Expert Environmental Control, Inc. v. Walker*, 13 K.A.2d 56, 57, 761 P.2d 320 (1988).

**77-504.** Waiver. Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this act.

History: L. 1984, ch. 313, § 4; July 1, 1985.

**77-505.** Informal settlements. Nothing in this act shall preclude informal settlement of matters that may make unnecessary more elaborate proceedings under this act.

History: L. 1984, ch. 313, § 5; July 1, 1985.

**77-506.** Conversion of proceedings. (a) At any point in a state agency proceeding the presiding officer or other state agency official responsible for the proceeding:

(1) May convert the proceeding to another type of state agency proceeding if the conversion is appropriate, is in the public interest and does not substantially prejudice the rights of any party; and

(2) If required by any provision of law, shall convert the proceeding to another type of state agency proceeding.

(b) A conversion of a proceeding of one type to a proceeding of another type may be effected only upon notice to all parties to the original proceeding.

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(c) If the presiding officer or other state agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, that officer or official, in accordance with state agency procedure, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

(d) The record of the original state agency proceeding may be used in the new state agency proceeding.

(e) After a proceeding is converted from one type to another, the presiding officer or other state agency official responsible for the new proceeding shall:

(1) Give such additional notice to parties or other persons as is necessary to satisfy the requirements pertaining to those proceedings;

(2) dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements pertaining to the new proceedings; and

(3) conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements pertaining to those proceedings.

History: L. 1984, ch. 313, § 6; L. 1986, ch. 356, § 2; July 1, 1989.

## Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 57, 63 (1985).

**77-507.** Effective date of act. This act shall take effect on July 1, 1985, and does not govern adjudicative proceedings pending on that date. Subject to K.S.A. 1985 Supp. 77-503, this act governs all state agency adjudicative proceedings commenced after that date. This act also governs state agency adjudicative proceedings conducted on a remand from a court or another state agency after the effective date of this act.

History: L. 1984, ch. 313, § 7; July 1, 1985.

**77-507a.** Effective date of 1988 act. This act shall take effect on July 1, 1989, and does not govern adjudicative proceedings pending on that date. Subject to K.S.A. 77-503 and amendments thereto, this act governs all state agency adjudicative proceedings commenced after that date. This act also governs state agency adjudicative proceedings conducted on a remand from a court or another state agency after the effective date of this act.

History: L. 1988, ch. 356, § 360; July 1, 1989.

**77-508.** Hearings, not required in certain circumstances. A hearing shall not be required for a decision:

(a) To issue or not to issue a complaint, summons or similar accusation; or

(b) to initiate or not to initiate an investigation, prosecution or other proceeding before the state agency, another agency or a court.

History: L. 1984, ch. 313, § 8; L. 1986, ch. 356, § 3; L. 1989, ch. 283, § 1; July 1.

## Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 57 (1985).

**77-509.**

History: L. 1984, ch. 313, § 9; L. 1986, ch. 362, § 1; L. 1988, ch. 356, § 4; Repealed, L. 1989, ch. 283, § 26; July 1.

**77-510.**

History: L. 1984, ch. 313, § 10; Repealed, L. 1989, ch. 283, § 26; July 1.

**77-511.** Time limits for processing application for an order or a request for a hearing; expiration of license, when. (a) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute, a state agency shall process an application for an order on which a statute provides for a hearing under this act as follows:

(1) Within 30 days after receipt of the application, the state agency shall acknowledge receipt thereof and inform the applicant of the name, official title, mailing address and telephone number of a state agency member or employee who may be contacted regarding the application. As soon as practicable, the state agency shall notify the applicant of any apparent errors or omissions. Failure to detect such errors or omissions does not preclude the state agency from raising them at a later stage of the proceeding.

(2) When practicable, within 90 days after receipt of a completed application, the state agency shall:

(A) Approve or deny the application, in whole or in part, on the basis of emergency or summary proceedings, if those proceedings are available under this act for disposition of the matter; or

(B) commence a formal hearing or a conference hearing in accordance with this act.

(b) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute, a state agency shall process a request for a hearing as follows:

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(1) Within 30 days after receipt of the request, the state agency shall acknowledge receipt thereof and if the state agency has not previously done so, the state agency shall notify the applicant of the name, official title, mailing address and telephone number of a state agency member or employee who may be contacted regarding the request; and

(2) when practicable, within 90 days after receipt of the request the state agency shall commence a formal or conference hearing in accordance with this act unless a statute makes the granting of a hearing discretionary with the state agency and the state agency determines not to conduct a hearing.

(c) A hearing commences when the state agency or presiding officer notifies a party that a prehearing conference or other stage of the hearing will be conducted.

(d) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the state agency has taken final action upon the application for renewal or, if the state agency's action is unfavorable, until the last day for seeking judicial review of the state agency's action or a later date fixed by the reviewing court.

History: L. 1984, ch. 313, § 11; L. 1986, ch. 362, § 2; L. 1988, ch. 356, § 5; L. 1989, ch. 283, § 2; July 1.

**77-512. Orders affecting licensure; requirements.** A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license unless the state agency first gives notice and an opportunity for a hearing in accordance with this act. This section does not preclude a state agency from (a) taking immediate action to protect the public interest in accordance with K.S.A. 77-536, and amendments thereto, or (b) adopting rules and regulations, otherwise within the scope of its authority, pertaining to a class of licensees, including rules and regulations affecting the existing licenses of a class of licensees.

History: L. 1984, ch. 313, § 12; L. 1989, ch. 283, § 3; July 1.

### FORMAL HEARINGS

**77-513. Hearings, applicable procedures.** When a statute provides for a hearing in accordance with this act, the hearing shall be governed by K.S.A. 77-513 through 77-532, and amendments thereto, except as otherwise provided by:

(a) A statute other than this act, or  
(b) K.S.A. 77-533 through 77-541, and amendments thereto  
History: L. 1984, ch. 313, § 13; L. 1986, ch. 362, § 3; L. 1988, ch. 356, § 6; L. 1989, ch. 283, § 4; July 1.

Law Review and Bar Journal References:  
"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 57 (1985).

**77-514. Presiding officer.** (a) The agency head or one or more other persons designated by the agency head may be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) A state agency may enter into agreements with another state agency to provide hearing officers to conduct proceedings under this act or for other agency proceedings.

History: L. 1984, ch. 313, § 14; July 1, 1985.

**77-515. Participation and representation.** (a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be represented at the party's own expense by counsel or, if permitted by law, other representative.

(c) A state agency may require a corporation or other artificial person to participate by counsel.

History: L. 1984, ch. 313, § 15; L. 1986, ch. 362, § 4; July 1.

**77-516. Prehearing conference; notice.** The presiding officer designated to conduct the

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hearing may conduct a prehearing conference. If the conference is conducted:

(a) The state agency may assign a presiding officer for the prehearing conference, exercising the same discretion as is provided by K.S.A. 77-514 and amendments thereto concerning the selection of a presiding officer for a hearing.

(b) The presiding officer for the prehearing conference shall set the time and place of the conference and give reasonable notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(c) The notice shall include:

(1) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;

(3) the official file or other reference number, the name of the proceeding and a general description of the subject matter;

(4) a statement of the time, place and nature of the prehearing conference;

(5) a statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

(6) the name, official title, mailing address and telephone number of the presiding officer for the prehearing conference;

(7) a statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference hearing or a summary proceeding for disposition of the matter as provided by this act; and

(8) a statement that a party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default under this act.

(d) The notice may include any other matters that the presiding officer considers desirable to expedite the proceedings.

History: L. 1984, ch. 313, § 16; L. 1988 ch. 356, § 7; July 1, 1989.

**77-517. Prehearing conference; procedure; prehearing order.** (a) The presiding officer may conduct all or part of the prehearing conference by telephone or other electronic means if each participant in the conference has an opportunity to participate in the entire proceeding while it is taking place.

(b) The presiding officer shall conduct the prehearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type, exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form, and the extent to which telephone or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

(c) If a prehearing conference is not held, the presiding officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

History: L. 1984, ch. 313, § 17; July 1, 1985.

**77-518. Notice of hearing.** (a) The state agency shall set the time and place of the hearing and give reasonable written notice at least 10 days prior to the hearing to all parties and to all persons who have filed written petitions to intervene in the matter. Service of notices shall be made in accordance with K.S.A. 77-531 and amendments thereto.

(b) The notice shall include a copy of any prehearing order rendered in the matter.

(c) To the extent not included in a prehearing order accompanying it, the notice shall include:

(1) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;

(3) the official file or other reference number, the name of the proceeding and a general description of the subject matter;

(4) a statement of the time, place and nature of the hearing;

(5) a statement of the legal authority and jurisdiction under which the hearing is to be held;

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(6) the name, official title, mailing address and telephone number of the presiding officer;

(7) a statement of the issues involved and, to the extent known to the presiding officer, of the matters asserted by the parties; and

(8) a statement that a party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default under this act.

(d) The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

(e) The state agency shall cause notice to be given to persons entitled to notice under any provision of law who have not been given notice under subsection (a). Notice under this subsection shall be given in the manner specified by such provision of law or, if no such manner is specified, in a manner to be determined by the agency. If a person other than the agency is directed to give notice under this subsection, the agency shall require that the person furnish proof that the notice has been given. Notice under this subsection may include all types of information provided in subsections (a) through (d) or may consist of a brief statement indicating the subject matter, parties, time, place and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied and name and telephone number of the presiding officer.

History: L. 1984, ch. 313, § 18; L. 1988, ch. 356, § 8; July 1, 1989.

### Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 58 (1985).

**77-519. Pleadings, motions, briefs; service.** (a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions and objections.

(b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by state agency rule and regulation.

History: L. 1984, ch. 313, § 19; L. 1986, ch. 362, § 5; July 1.

**77-520. Default.** (a) If a party fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative pro-

ceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.

(b) Within seven days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(c) Unless vacated by the presiding officer, the proposed default order shall become effective after expiration of the time within which the party may file a written motion under subsection (b).

(d) After a default order becomes effective, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The presiding officer in lieu of determining the issues affecting the defaulting party may, unless otherwise prohibited by law, dismiss such party's application for an adjudicative proceeding.

History: L. 1984, ch. 313, § 20; L. 1986, ch. 362, § 6; L. 1988, ch. 356, § 9, July 1, 1989.

**77-521. Intervention.** (a) The presiding officer shall grant a petition for intervention if:

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least three days before the hearing;

(2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

(3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

(b) The presiding officer may grant a petition for intervention at any time upon determining that the intervention sought is in the

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interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

(d) The presiding officer, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying or modifying intervention to the petitioner for intervention and to all parties.

History: L. 1984, ch. 313, § 21; July 1, 1985.

**77-522. Discovery; authorization; requests; subpoenas, discovery orders and protective orders.** (a) Discovery shall be permitted to the extent allowed by the presiding officer or as agreed to by the parties. Requests for discovery shall be made in writing to the presiding officer and a copy of each request for discovery shall be served on the party or person against whom discovery is sought. The presiding officer may specify the times during which the parties may pursue discovery and respond to discovery requests. The presiding officer may issue subpoenas, discovery orders and protective orders in accordance with the rules of civil procedure.

(b) Subpoenas issued by the presiding officer shall be served by a person designated by the presiding officer or any other person who is not a party and is not less than 18 years of age. Service shall be in person and at the expense of the requesting party. Proof of service shall be shown by affidavit.

(c) Subpoenas and orders issued by the presiding officer may be enforced pursuant to the provisions of the act for judicial review and civil enforcement of agency actions.

History: L. 1984, ch. 313, § 22; L. 1988, ch. 356, § 10; L. 1989, ch. 283, § 5; July 1.

**77-523. Hearing procedure.** At a hearing:

(a) The presiding officer shall regulate the course of the proceedings.

(b) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(c) The presiding officer may, and when required by statute shall, give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(d) The presiding officer may conduct all or part of the hearing by telephone or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.

(e) The presiding officer shall cause the hearing to be recorded at the state agency's expense. The state agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense and subject to such reasonable conditions as the state agency may establish, may cause a person other than the state agency to prepare a transcript from the state agency's record, or cause additional recordings to be made during the hearing.

(f) The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure.

History: L. 1984, ch. 313, § 23; L. 1988, ch. 356, § 11; July 1, 1989.

Law Review and Bar Journal References:  
"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 59 (1985).

**77-524. Evidence; official notice.** (a) A presiding officer need not be bound by technical rules of evidence, but shall give the par-

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ties reasonable opportunity to be heard and to present evidence, and the presiding officer shall act reasonably without partiality. The presiding officer shall give effect to the rules of privilege recognized by law. Evidence need not be excluded solely because it is hearsay.

(b) All testimony of parties and witnesses shall be made under oath or affirmation and the presiding officer shall have the power to administer an oath or affirmation for that purpose.

(c) Statements presented by nonparties in accordance with paragraph (c) of K.S.A. 1985 Supp. 77-523 may be received as evidence.

(d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original if available.

(f) Official notice may be taken of (1) any matter that could be judicially noticed in the courts of this state, (2) the record of other proceedings before the state agency, (3) technical or scientific matters within the state agency's specialized knowledge, and (4) codes of standards that have been adopted by an agency of the United States, of this state or of another state or by a nationally recognized organization or association. Parties shall be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on matters or material noticed, of the specific matters or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the matters or material so noticed.

History: L. 1984, ch. 313, § 24; July 1, 1985.

**77-525. Ex parte communications; exemption for certain agencies.** (a) A presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding while the proceeding is pending, with any party or participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) A member of a multimember panel, presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not:

(1) Receive *ex parte* communications of a type that the presiding officer would be prohibited from receiving; or

(2) furnish, augment, diminish or modify the evidence in the record.

(c) Unless required for the disposition of *ex parte* matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may directly or indirectly communicate in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer unless notice and an opportunity are given all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an *ex parte* communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an *ex parte* communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made and the identity of each person from whom the presiding officer received an *ex parte* communication and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the *ex parte* communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(f) If necessary to eliminate the effect of an *ex parte* communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may pre-

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vide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546; and

(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548.

History: L. 1984, ch. 313, § 25; L. 1986, ch. 362, § 7; L. 1988, ch. 356, § 12; July 1, 1989.

**77-526.** Orders, initial and final; exception for state corporation commission. (a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527 and amendments thereto.

(c) A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(e) If a substitute presiding officer is appointed pursuant to K.S.A. 77-514 and amendments thereto, the substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

(h) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, on the agency head in the manner prescribed by K.S.A. 77-531 and amendments thereto.

(i) Notwithstanding the other provisions of this section, if the presiding officer in a hearing before the state corporation commission is not the agency head, the presiding officer shall not render an initial order but shall make written findings and recommendations to the commission. The commission shall render and serve a final order within 60 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

History: L. 1984, ch. 313, § 26; L. 1988, ch. 356, § 13; July 1, 1989.

### Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 60 (1985).

### CASE ANNOTATIONS

1. Failure to render final or initial order does not deprive agency of jurisdiction. *Expert Environmental Control, Inc. v. Walker*, 13 K.A.2d 56, 58, 761 P.2d 320 (1988).

**77-527.** Review of initial order; exceptions to reviewability. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise

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# MS-91-14 Approval Date JUN 12 1991

Effective Date

Superseded MS-90-46



KANSAS MEDICAID STATE PLAN

Attachment 4.19D

Part II

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**77-528 STATUTES; ADMIN. RULES AND REGULATIONS; PROCEDURES**

any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) In reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties.

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this sec-

tion shall identify any difference between the order and the initial order and shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526 and amendments thereto.

(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 77-531 and amendments thereto.

History: L. 1984, ch. 313, § 27; L. 1988, ch. 356, § 14; July 1, 1989.

**77-528. Stay.** A party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order until the time at which a petition for judicial review would no longer be timely, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

History: L. 1984, ch. 313, § 28; July 1, 1985.

**77-529. Reconsideration.** (a) Any party, within 15 days after service of a final order, may file a petition for reconsideration with the agency head, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review except as provided in K.S.A. 44-1010 and 44-1115 and amendments thereto concerning orders of the commission on civil rights, K.S.A. 1987 Supp. 55-606 and 66-118b and amendments thereto concerning orders of the corporation commission and K.S.A. 1987 Supp. 74-2426 and amendments thereto concerning orders of the board of tax appeals.

(b) The agency head shall render a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the agency head states, in the written order, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, to justify the order. The petition is deemed to have been denied if the agency head does not dispose of it within 20 days after the filing of the petition.

# KANSAS MEDICAID STATE PLAN

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## ADMINISTRATIVE PROCEDURE ACT

77-534

An order under this section shall be served on the parties in the manner prescribed by K.S.A. 77-531 and amendments thereto.

History: L. 1984, ch. 313, § 29; L. 1988, ch. 356, § 15; July 1, 1989.

Law Review and Bar Journal References:  
"Appellate Court Jurisdiction: An Update," Debra S. Byrd, 58 J.K.B.A. No. 1, 21, 23 (1989).

**77-530. Orders, when effective.** (a) Unless a later date is stated in a final order or a stay is granted, a final order is effective upon service.

(b) Unless a later date is stated in an initial order or a stay is granted, an initial order shall become effective and shall become the final order: (1) When the initial order is served, if administrative review is unavailable; (2) when the agency head serves an order stating, after a petition for review has been filed, that review will not be exercised; or (3) 30 days after service if no party has filed a petition for review by the agency head, the agency head has not given written notice of its intention to exercise review and review by the agency head is not otherwise required by law.

(c) This section does not preclude a state agency from taking immediate action to protect the public interest in accordance with K.S.A. 77-536 and amendments thereto.

History: L. 1984, ch. 313, § 30; L. 1988, ch. 356, § 16; July 1, 1989.

**77-531. Service of order.** Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the person's last known address. Delivery of a copy of an order or notice means handing the order or notice to the person or leaving the order or notice at the person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.

History: L. 1984, ch. 313, § 31; July 1, 1985.

**77-532. Record.** (a) A state agency shall maintain an official record of each formal hearing.

(b) The state agency record consists only of:

- (1) Notices of all proceedings;
- (2) any prehearing order;
- (3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (4) evidence received or considered;
- (5) a statement of matters officially noticed;
- (6) proffers of proof and objections and rulings thereon;

(7) proposed findings, requested orders and exceptions;

(8) the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(9) any final order, initial order, or order on reconsideration; and

(10) staff memoranda or data submitted to the presiding officer.

(c) Except to the extent that this act, or another statute provides otherwise, the state agency record, excluding matters under paragraph (10) of subsection (b), constitutes the exclusive basis for state agency action in formal hearings and for judicial review thereof.

History: L. 1984, ch. 313, § 32; L. 1988, ch. 356, § 17; July 1, 1989.

## CONFERENCE HEARING

**77-533. Conference hearing; use, when.** A conference hearing may be used if its use in the circumstances does not violate any provision of law and where there is:

(a) A matter in which there is no disputed issue of material fact; or

(b) a matter in which there is a disputed issue of material fact and the parties agree to a conference hearing.

History: L. 1984, ch. 313, § 33; L. 1988, ch. 356, § 18; July 1, 1989.

Law Review and Bar Journal References:  
"The New Kansas Administrative Procedure and Judicial Review Acts," David L. Ryan, 54 J.K.B.A. 53, 57, 62 (1985).

**77-534. Procedure.** The procedures of this act pertaining to formal hearings apply to a conference hearing, except to the following extent:

(a) If a matter is initiated as a conference hearing, no prehearing conference may be held.